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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-778

KATHLEEN K. WILKIN,

Petitioner,

vs.

SUNBEAM CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

MALCOLM MILLER,
600 Fourth National Bank Building,
Wichita, Kansas 67202,

WALTHER E. WYSS,
20 North Wacker Drive,
Suite 3200,
Chicago, Illinois 60606,

GEORGE R. CLARK,
5400 West Roosevelt Road,
Chicago, Illinois 60650,
Counsel for Respondent.

THE GUNNISON-GALESBURG PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 466 F. 2d 714 (1972). Such opinion affirmed the judgment of the United States District Court for the District of Kansas, which was entered after a full evidentiary hearing in favor of Respondent and against Petitioner. A petition for rehearing was denied by the Court of Appeals on October 2, 1972 and its mandate was spread on October 11, 1972.

The dispute between the parties has been before this Court before. It was a misappropriation case tried before a jury in the United States District Court for the District of Kansas which rendered its judgment in accordance with

the jury verdict in favor of Respondent and against Petitioner. An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment and jury verdict, reported at 377 F. 2d 344 (1967). A petition for rehearing was denied by the Court of Appeals on June 12, 1967. Its mandate was spread and effective June 26, 1967. This Court denied certiorari 389 U. S. 973, 88 S. Ct. 472, 19 L. Ed. 2d 464 (1967).

JURISDICTION.

Jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED.

In a situation where Petitioner, after jury trial and judgment in favor of Respondent which judgment was affirmed on appeal, rehearing denied and certiorari denied by this Court, and where more than a year after the mandate from the Court of Appeals was spread, filed a motion for relief from judgment based on an alleged fraud upon the court; and where after a full evidentiary hearing including testimony from every live witness about whom complaint was made and a consideration of all documentary evidence, the court that originally heard the controversy resolved questions of credibility and determined that no fraud was practiced upon the court which judgment was affirmed by the Court of Appeals:

Did such courts abuse their discretion so as to warrant the granting of a petition for certiorari by this Court?

STATEMENT.

Petitioner originally tried her misappropriation case in the United States District Court for the District of Kansas where jurisdiction lay because of diversity of citizenship

with the requisite amount in controversy. The agreed issues tried in such litigation were:

1. Whether anything was disclosed in confidence by Petitioner to Respondent;
2. Whether what was disclosed to Respondent was novel; and
3. Whether Respondent used anything disclosed to it by Petitioner in its Sunbeam Party Grill.

Trial was had on these issues and the jury verdict was for the Respondent. Judgment was entered by the trial court in accordance with such verdict, appeal was taken and the judgment of the District Court was affirmed. Rehearing was denied and a petition for certiorari was denied.

More than a year after the mandate of the Court of Appeals was spread and effective, Petitioner filed a motion for relief from judgment based upon an alleged fraud upon the court. The United States Court of Appeals for the Tenth Circuit determined (405 F. 2d 165) that the trial court was in a better position to pass on the issues raised than the Court of Appeals. Thereafter the trial court over a period of twenty two (22) months held seven (7) hearings on the Petitioner's complaints seeking the basis and all possible evidentiary support for the allegations of fraud upon the court, including a two-day hearing in which the court heard through live witnesses all matters in dispute and heard the very witnesses of whom Petitioner asserted fraud, perjury and suppression of documents.

Petitioner's assertions fall into two catgories:

1. That witnesses either in depositions or at trial testified falsely, and
2. That the attorneys for the Respondent intentionally suppressed documents and were guilty of a fraud upon the court in such suppression.

The documents allegedly suppressed fall into two categories:

1. Documents not found in Respondent's files, and
2. Documents not shown to the Petitioner in the discovery process because the trial court specifically declined to grant Petitioner's belated motion for their production although it did order these documents to be available at trial in case Petitioner should seek them, which she did not do.

In the first category there are two documents involved. One was sent to the Petitioner's attorneys anonymously. It is contained in the appendix to the Petition at page A26. The crux of its contents was exactly as described in the original trial.* The only discrepancy was that the witness recalled the events recited as a telephone conversation rather than as a letter. The other document, no copy of which has ever been found, is only referred to in such letter and may or may not have ever existed. The first letter (Appendix to Petition, p. A26) contains a handwritten note which Petitioner alleges is of major significance. It was the recollection of the witness Clark to whom it is directed (his initials are GRC) that he never saw the document since his initials are not crossed off and, it was his invariable practice to cross off his initials when he had seen any document bearing a routing designation to him.

Obviously such letter was at one time in Sunbeam's files, and if it had been located in its files, would have been produced and discovered in the pretrial discovery. In all likelihood Petitioner's witness Lewis, a disgruntled ex-employee of Sunbeam, removed such document from Sunbeam's files

* All other documents relating to the matter involved in this one letter were before the jury and also before this Court. See Appendix A to Respondent's Brief in opposition to the first petition to this Court (No. 606: October Term 1967).

and sent it to Petitioner's lawyer anonymously, for when Lewis was examined on such point as well as on many others, he sought refuge under the Fifth Amendment, and accordingly, no one can be certain that the letter was in the files of Sunbeam when they were searched.

The documents in the second category above were contained in the so-called "Funke file". Petitioner was aware of such file at least as early as the hearing before the trial court on December 16, 1963 but never asked for production until just before the trial. The trial court heard the motion to produce the "Funke file" at the final pretrial hearing held on April 6, 1965. The transcript of said hearing on this point is very illuminating. Petitioner's Counsel, Mr. Fettis, said (pp. 9 through 10*):

> "MR. FETTIS: May I say one thing further: Now, our other motion filed is that we have asked that they deliver to us for our inspection at this late date their correspondence or agreements had with Mr. Funke.
>
> "Now, this I perhaps should apologize for not having done this much sooner but the significance somewhat escaped me until we were reviewing some of these matters after our discovery and after our most recent conferences and **we learned perhaps what we should have realized a long time ago**, and that is that the Funke device—now, the Funke device was a similar device similar to ours and similar to the Sunbeam Party Grill which was submitted to them about a year after our matter was submitted to them. They ran cooking tests on the Funke device and it would appear now from a view of the whole file, so to speak, that the Funke submission perhaps triggered the study and ultimate development of the Sunbeam Party Grill.
>
> "Now, because of the similarities and because of this series of events, we think that we should be permitted at this time to examine any correspondence

* Pages 9 to 18 of the transcript of the portion of the April 6, 1965 hearing relating to the "Funke file" are contained in the appendix hereto pages A1 to A8.

with Funke or any agreements that they might have entered into with Funke, if any, and ascertain the connection that that might have to this lawsuit.

"Now, unfortunately early in this case we submitted what we thought were pretty broad general interrogatories. **I am not quarreling with counsel on this but they interpreted our interrogatories a little more narrowly than we had intended for them to be. I am not suggesting that there is anything wrong about this.** But certain matters were not disclosed to us in answer to interrogatories. We feel that this is one of them.

"Now, **true, we were asking about the Wilkin matter and they perhaps rightly felt that the Funke matter had nothing to do with the Wilkin matter,** but these matters are so closely interrelated that we feel that we should be permitted to examine these matters and see if they are not pertinent to our cause of action." (Emphasis added).

The trial court on April 6, 1965 denied Petitioner's belated motion for production of the "Funke file" because of the failure of Petitioner to show "good cause" for its production as was then required by Rule 34 of the Federal Rules of Civil Procedure. However, the court ordered Respondent to have the "Funke file" available at the trial and as shown hereinafter even advised Petitioner as to how to make the necessary showing to obtain the documents contained in such file. Petitioner never attempted at the trial to follow the trial court's suggestion nor took any other action to obtain the documents. She simply ignored the documents.

REASONS FOR DENYING THE WRIT.

1. The decision below is not in conflict with any decisions of any other court of appeals and is in accord with the principles pronounced by this Court in *Hazel-Atlas*

Glass Co. v. *Hartford-Empire Co.*, 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

2. The decision below involves no abuse of discretion and is manifestly correct. The facts were determined by the trial court after hearing live testimony from the very persons about whom Petitioner complains. The legal principles applied by the Court of Appeals and by the trial court are well settled and recognized by many of our courts of appeal. *Winfield Assocs., Inc.* v. *Stonecipher*, 429 F. 2d 1087 (10th Cir., 1970); *Abel* v. *Tinsley*, 338 F. 2d 514 (10th Cir., 1964); *Valmont Industries, Inc.* v. *Eurosco*, 446 F. 2d 1193 (10th Cir., 1971); *Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (9th Cir., 1957); *Assmann* v. *Fleming*, 159 F. 2d 332 (8th Cir., 1947).

ARGUMENT.

I.

There Is No Conflict Between the Opinion Below and the Opinion of Any Other of Our Courts of Appeal. The Decision Below Is in Accord with the Pronouncements of This Court.

Petitioner proceeded under Rule 60(b) F. R. C. P. Relief is sought upon the basis of an alleged fraud upon the court. The landmark case is from this Court, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra.* Relief from the judgment based upon fraud upon the court is well recognized. Some confusion among a few of the decisions has occurred because of an effort to distinguish between extrinsic and intrinsic fraud. See 7 Moore's Federal Practice and Procedure, ¶ 60.37[1], page 617 and ¶ 60.33, page 511, et seq.

The burden is upon the Petitioner to prove the alleged fraud by clear and convincing evidence. It is well established, particularly where the court that decided the matter originally hears the Rule 60(b) motion, and especially where such court hears such motion through live witnesses who testified on the very gravamen of the matter in controversy and resolves such controversy, that such decision will only be set aside on a clear showing of abuse of discretion. See among many cases all setting forth the same principle: *Winfield Assocs., Inc.* v. *Stonecipher, supra; Abel* v. *Tinsley, supra; Valmont Industries, Inc.* v. *Enresco, supra; Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett, supra; Assmann* v. *Fleming, supra.*

Originally this case was heard as a misappropriation case in the United States District Court for the District of Kansas before a jury, Judge Brown presiding. The jury

verdict was affirmed by the Court of Appeals and certiorari was denied by this Court as set forth hereinabove. Petitioner's motion under Rule 60(b) was also heard by the United States District Court through Judge Brown. The witnesses about whom complaint was made by Petitioner testified in person before Judge Brown. His decisions denying relief were affirmed by the Court of Appeals in accord with the decisions of this Court and well established practice. Obviously, there was no abuse of discretion.

II.

There Is No Credible Evidence of Perjury, Misstatements, or Wrongdoing on the Part of Respondent's Witnesses as Determined by the Trial Court Who Heard Such Witnesses Live in Open Court. The Decision Below Is Manifestly Correct.

Petitioner repeatedly asserts that Respondent's lawyer Clark testified untruthfully. Actually Mr. Clark did not testify at the original trial, albeit his deposition was taken but was not introduced into evidence by Petitioner. He did testify in open court at the two-day hearing on Petitioner's Rule 60(b) motion. Contrary to Petitioner's argument Mr. Clark did not testify falsely* during his deposition concerning whether Respondent had a form letter or release form used for outside disclosures. Petitioner's exhibit (Appendix p. A25) is obviously not a form release, but a tailor-made release and, as Mr. Clark testified, which he prepared particularly for Mr. Funke's signature since Mr. Funke presented a device to Sunbeam without bringing a copy of

*Mr. Clark also never testified as Plaintiff alleges (p. 15 of Petition) that "he had absolutely no knowledge of the Wilkin submission until 1962." He did testify at a deposition taken on October 14, 1963 that it was *his recollection* that he had no knowledge of the Wilkin device or its submission to Sunbeam prior to 1962.

his patent application, unlike Petitioner who presented a device with her patent application.

Mr. Clark did not point out to Mr. Funke that Petitioner was first. This is clearly evident from Petitioner's own exhibit contained in the appendix to her Petition (p. A29) wherein Clark pointed out, long before this litigation arose, that sandwich toasters (such as Mr. Funke's) were well known in the art as evidenced by U. S. patents such as Fajen 1,969,361, Strietelmeier, 2,463,439 and Hall 2,587,314. Petitioner's submission to Respondent was indeed in 1957 prior to the Funke submission to Respondent in 1958, but both submissions were of devices old in the art and well known to Respondent. This is also shown by the exhibits contained in the appendix to Petitioner's petition at A28, A30 and A31.

Petitioner's argument about the "X" marks in the corners of documents contained as exhibits to Petitioner's appendix is erroneous. Petitioner's witness Lewis, who took the Fifth Amendment, testified that he was told that the "X" mark was put on documents to indicate that they had been considered and it was concluded they had nothing to do with the Wilkin lawsuit, and accordingly, Petitioner was not entitled to see the documents (V. 4, pp. 53-54). Actually, Mr. Clark testified that prior to trial he went through the "Funke file" and put a red "X" on the documents in that file which had not been shown to the court *in camera** and that copies of the documents corresponding to the *in camera* documents were marked "CONF" meaning that the documents so marked had been held to be privileged. Petitioner's statement that Mr. Clark testified that he placed the "X" mark on the September 29th letter is completely inaccurate. Mr. Clark's testimony was that he never saw the September 29th letter. While it is true

* A number of documents were shown to the trial court *in camera* and were held to be privileged.

that there are "Xs" on some of Petitioner's documents (note Appendix A25, A26, A29), there is no evidence that Mr. Clark put such "Xs" on such documents submitted by Petitioner. Mr. Lewis could well have put the "X" mark on the document before sending it anonymously to one of Petitioner's attorneys.

There are many more examples that could be discussed. In the interest of brevity, we only point out once again that the trial court heard live all the witnesses having anything to do with the matters about which Petitioner complains and resolved those issues as a trial court must. The Court of Appeals affirmed and stated at 466 F. 2d 717:

> "On the record presented we are unable to see how the trial court could have reached any other result."

III.

Respondent Did Not Suppress Any Documents and Did Not Commit Any Fraud Upon the Court. Petitioner and the Court Were Well Aware of the "Funke File" and It Was Only as a Result of the Petitioner's Strategy That the Documents Therefrom Did Not Become a Part of the Record in the Original Trial.

Respondent did develop what is characterized as the Sunbeam Party Grill, its research and development beginning as shown during the original trial in December of 1958. The Funke submission occurred just prior thereto. There was no novelty in the Wilkin device and she was unable to obtain a patent despite diligent efforts to obtain one, including two separately filed applications in the United States Patent Office, one filed December 3, 1956 and the other on May 16, 1962. (Respondent and Funke each got some narrow claims allowed in their respective patents, none of which covered the Wilkin submission.)

Petitioner was aware of the Funke device which was received into evidence as an exhibit in the jury trial and was aware of the Funke submission prior to the trial of the original case. Indeed, this whole matter was considered by the trial court at the final pretrial conference held on April 6, 1965, shortly prior to the first trial (see the attached Appendix pages A1-A8). At that time Petitioner was well aware of the reason the "Funke file" was not produced and was not even quarreling with Respondent on the matter. Petitioner's view *then* is in sharp contrast with her view *now* that somehow the "Funke file" was suppressed in such manner as to constitute a fraud on the court. The trial court was aware of the "Funke file" and denied Petitioner's motion for production of the "Funke file" brought on the eve of trial because of failure to show any cause much less good cause for its production. The trial court, however, *did* require Respondent to have the "Funke file" available in the courtroom at trial and it was. The trial court and Petitioner's attorney determined together how it could be used as noted from the transcript of the pretrial conference of April 6, 1965 (Appendix pp. A2-A3):

"THE COURT: • • •

"Now, then, your problem about Funke, you are in effect asking for a showing of documents under Rule 34 for which there has to be an adequate reason. You have taken the depositions of all the people who dealt with Funke, haven't you?

"MR. FETTIS: Yes.

"THE COURT: So that you have their statements with respect to what happened."

• • • • •

"MR. FETTIS: • • •

"I will agree that **the significance of some of this should not have escaped my attention at the time of some of these depositions** but, nevertheless, it did and it was only after a review of a lot of things.

"THE COURT: Well, —

"MR. FETTIS: They will be using the Funke device in this trial. We weren't aware of that at the time of this deposition.

"THE COURT: They will be using the Funke device, is that correct?

"MR. MILLER: If the Court please, it is listed as an exhibit and they went through this very matter when they took the depositions in Chicago. Mr. Jepson told them it was the Funke device. The problem I have with this is not only the showing, as you correctly point out under Rule 34, but the timing involved in it. I don't want to be in the position of trying to cover up anything but if we go into this area now we could well put off the time of trial again and I don't think, if you balance the two, it is worthwhile.

"They do know and are aware and everybody was aware for a year and a half that Mr. Funke brought in a device to Sunbeam, made from production tools, because this is what they ascertained in the deposition, if in no other manner. That device was at least identified during those depositions and in Mr. Jepson's deposition. There certainly was no secret about it. It is a thing that we have all known for a year and a half that he did make such a submission in the summer of 1958."

Furthermore, after stating: "**I will tell the defendant now to have their correspondence with Funke available** [at the trial]" (p. 15* of April 6, 1965 Transcript), the Court, during the final pretrial conference, specifically pointed out to Petitioner's counsel how the Funke documents could be obtained at the trial during the following colloquy (Transcript of April 6, 1965, pp. 17-18; Appendix to this Brief pp. A7 to A8):

"MR. FETTIS: For instance, here is what will happen: we will ask them, as we have already, whether or

* Page A5 of Appendix hereto.

not they entered into any agreement to pay anything to Funke for his submission which he made to them and which I understand they will say, 'No.'

"THE COURT: All right.

"MR. MILLER: That is what I told them because that is what I understand.

"MR. FETTIS: Then if we ask them on what grounds they turned him down, I don't know what the answer to that will be. I assume it will be because they felt he had nothing that was novel or patentable and so forth.

"THE COURT: Well, when they are on the witness stand you can certainly be able to inquire if they did turn them down, 'Did you write a letter turning them down.'

"MR. FETTIS: That is what I am getting to.

"THE COURT: Yes, I know what you are getting to. If they say, 'Yes, we did,' you can say, 'Let me see the letter.'

"MR. FETTIS: That is what I want.

"THE COURT: **That isn't any problem. That is why I am having them have them [the "Funke file"] here.**

"MR. FETTIS: That is fine.

"THE COURT: **And you better put 'agreements or correspondence'.**

"MR. MILLER: 'Correspondence.'

"THE COURT: 'Or, agreements with Funke.'

"MR. MILLER: That is what I understood you meant.

"THE COURT: Yes. And this would be on cross-examination.

"MR. FETTIS: Yes, this is fine.

"THE COURT: **We are not trying to keep you from it.**

"MR. FETTIS: **I know that.**" (Emphasis added.)

Clearly, the documents from the "Funke file" were not suppressed and no fraud was committed on the court.

The only other documents which Petitioner asserts were suppressed are two letters between Sunbeam and the International Service Corporation, one purportedly dated September 4 (which may never have existed since it has not been found by anybody) and one dated September 29, 1958 (Appendix to Petition p. A26). This document should have been produced by Respondent and would have if it were contained in Respondent's file. Obviously, it must have been removed therefrom and we submit the only logical explanation is that Petitioner's witness Lewis removed it from Sunbeam's files and sent it anonymously to Petitioner's counsel. A review of the September 29th letter and Petitioner's arguments make it abundantly clear that there is nothing of relevance in the letter which was not brought out by the other exhibits and the testimony at the trial regarding the relationship between Respondent and Mr. U. O. Cumming.

The trial court with great patience in seven (7) hearings spread out over almost two years heard all of Petitioner's complaints, held the hearings required and resolved the issues in accordance with established practice. The only thing unusual in the Petition is the intemperate language of Petitioner and the rank conclusions drawn by Petitioner supported solely by Petitioner's choice of vituperate adjectives.

Manifestly the decision below is correct and there is nothing in the proceedings which warrants this Court's use of its power to supervise the lower Federal Courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari be denied.

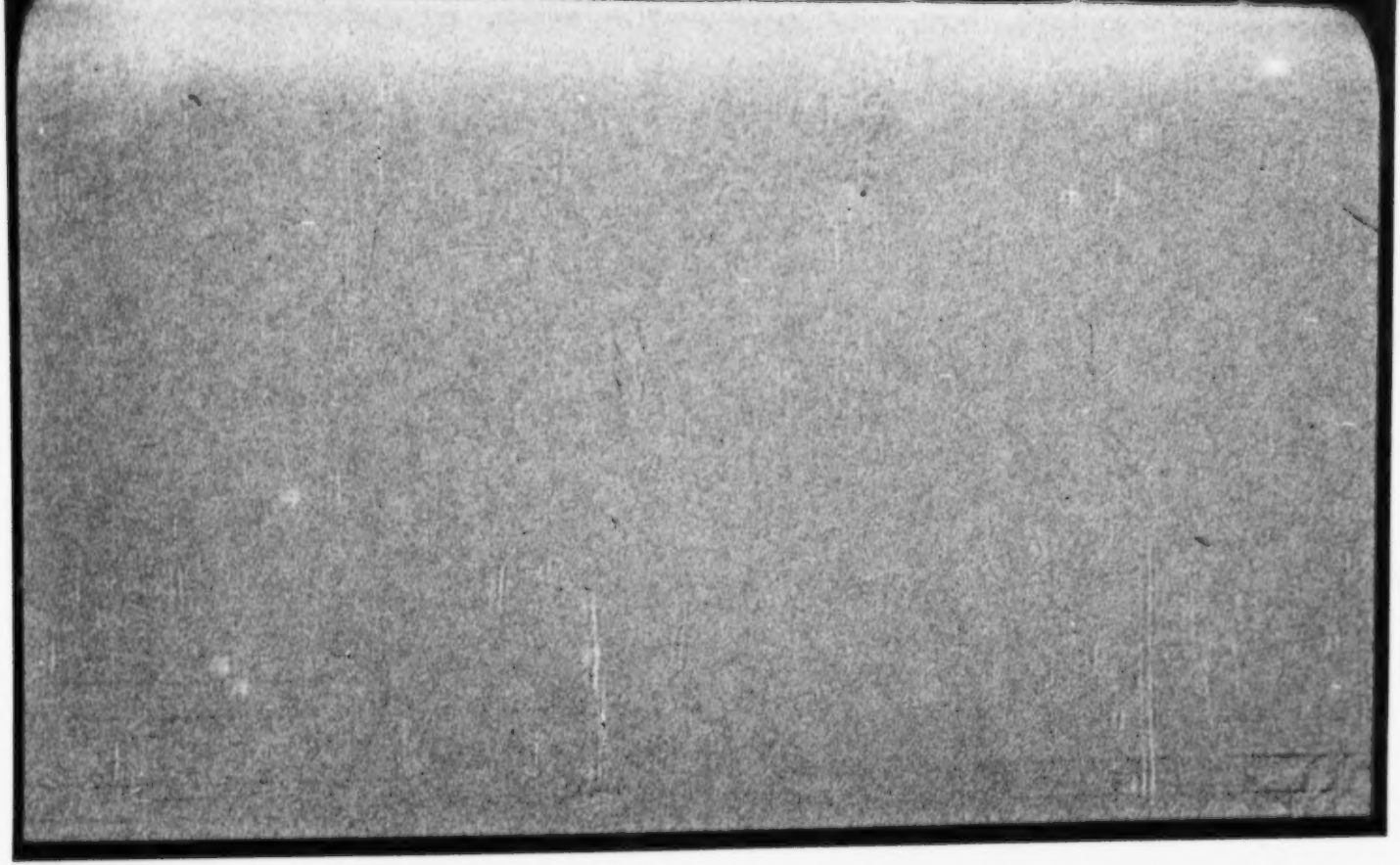
Respectfully submitted,

MALCOLM MILLER,
600 Fourth National Bank Building,
Wichita, Kansas 67202,

WALTHER E. WYSS,
Suite 3200,
20 North Wacker Drive,
Chicago, Illinois 60606,

GEORGE R. CLARK,
5400 West Roosevelt Road,
Chicago, Illinois 60650,
Counsel for Respondent.

Appendix



APPENDIX.

Pages 9 to 19 of Transcript of Hearing Before Trial Court Held April 6, 1965.

Mr. Fettis: May I say one thing further: Now, our other motion filed is that we have asked that they deliver to us for our inspection at this late date their correspondence or agreements had with Mr. Funke.

Now, this I perhaps should apologize for not having done this much sooner but the significance somewhat escaped me until we were reviewing some of these matters after our discovery and after our most recent conferences and we learned perhaps what we should have realized a long time ago, and that is that the Funke device—now, the Funke device was a similar device similar to ours and similar to the Sunbeam Party Grill which was submitted to them about a year after our matter was submitted to them. They ran cooking tests on the Funke device and it would appear now from a view of the whole file, so to speak, that the Funke submission perhaps triggered the study and ultimate development of the Sunbeam Party Grill.

Now, because of the similarities and because of this series of events, we think that we should be permitted at this time to examine any correspondence with Funke or any agreements that they might have entered into with Funke, if any, and ascertain the connection that that might have to this lawsuit.

Now, unfortunately early in this case we submitted what we thought were pretty broad general interrogatories. I am not quarreling with counsel on this but they interpreted our interrogatories a little more narrowly than we had intended for them to be. I am not suggesting that there is

anything wrong about this. But certain matters were not disclosed to us in answer to interrogatories. We feel that this is one of them.

Now, true, we were asking about the Wilkin matter and they perhaps rightly felt that the Funke matter had nothing to do with the Wilkin matter, but these matters are so closely interrelated that we feel that we should be permitted to examine these matters and see if they are not pertinent to our cause of action.

For instance, we were given a reason, our client was given the reason, for the original turn down of her submission, because of the high cost of promotion. We would like to know perhaps what reason they gave Mr. Funke for turning down his submission. We would like to know if there were any releases and so forth, any reference made to the previous submission by Wilkin in correspondence with Funke, whether this was a contemplated matter and it may be that it will be totally irrelevant to this lawsuit, but there is enough chance that it is relevant that we think we should be permitted to examine into these documents.

I can't see that they would be prejudiced in any way by permitting this inspection at this time.

And I might add that in connection with, again, with these privileged documents, they also in "time" were close to the Funke submission. Now, I don't really think that probably, if it is privileged it is probably privileged—perhaps this is irrelevant as far as reviewing privileged documents is concerned but this is to explain our reason for these two motions.

The Court: Well, you have given me no reason to change my previous ruling with respect to those matters I ruled privileged and I will overrule that motion.

Now then, your problem about Funke, you are in effect asking for a showing of documents under Rule 34 for which

there has to be an adequate reason. You have taken the depositions of all of the people who dealt with Funke, haven't you?

Mr. Fettis: Yes.

The Court: So that you have their statements with respect to what happened. You have had the opportunity to take Funke's deposition if you need to.

Mr. Fettis: Funke is deceased, I might add. Now, I will say this: We have talked via long-distance phone with his attorney, his patent attorney I believe, and also the attorney that has handled the estate. We have sought to talk with his widow. I don't think we ever talked to her. But we have undertaken to obtain whatever information we could on that source.

I will agree that the significance of some of this should not have escaped my attention at the time of some of these depositions but, nevertheless, it did and it was only after a review of a lot of things.

The Court: Well,—

Mr. Fettis: They will be using the Funke device in this trial. We weren't aware of that at the time of this deposition.

The Court: They will be using the Funke device, is that correct?

Mr. Miller: If the Court please, it is listed as an exhibit and they went through this very matter when they took the depositions in Chicago. Mr. Jepson told them it was the Funke device. The problem I have with this is not only the showing, as you correctly point out under Rule 34, but the timing involved in it. I don't want to be in the position of trying to cover up anything but if we go into this area now we could well put off the time of trial again and I don't think, if you balance the two, it is worthwhile.

They do know and are aware and everybody was aware for a year and a half that Mr. Funke brought in a device to Sunbeam, made from production tools, because this is what they ascertained in the deposition, if in no other manner. That device was at least identified during those depositions and in Mr. Jepson's deposition. There certainly was no secret about it. It is a thing that we have all known for a year and a half that he did make such a submission in the summer of 1958

I think that at this time in the trial we ought to get at it instead of pursuing another area. I don't know where it will end is the big problem. It is just a matter of looking up a half dozen pieces of correspondence, that is right, but it depends on what you do with it and where it—

The Court: I was looking in here for the language which has been usual in pretrial orders and which is not in here.

Mr. Miller: You mean about the discovery being complete?

The Court: Yes.

Mr. Miller: I couldn't very well provide it, Judge, since they had the motion. It was complete so far as we knew up to that point.

The Court: I understand that but the balance of that statement is the one that I am talking about. That "discovery is complete except" and "that all exhibits and evidence have been disclosed except those permissible in proper rebuttal."

Mr. Miller: I was aware of Your Honor's statement.

The Court: Now, I think this properly should be covered in rebuttal, if it is useful at all, it has to be in rebuttal by the plaintiff in showing that whatever may occur in connection with it, with the Funke device, isn't it? If you are using it in your case in chief, unless you are showing a whole method or area of practice of this company and

what they do, it lacks some materiality with me, what they may have done with some other unit, but if they use it as a defense to your contention that they took your ideas, then it seems to me that rebuttal-wise it is proper and I will direct the defendant to have material available in the event it is necessary for proper rebuttal and insofar as my statements here are applicable to the pretrial order they will become a portion of the pretrial order.

Now, I don't want a "hassle" with respect to whether this is a part of the case in chief or rebuttal. I want to dispose of that now. That if it is going to be a part of the case in chief I am going to have to hear more about it. And you are going to have to be somewhat more specific with respect to what documents you want.

I agree with the defendant, as you do I know except for the interest which you must present of your client, that this is a rather late date to start investigating into the files of the defendant corporation. But if it is properly rebuttal, and I think from what you have said it is, I think you will have the right to disclose it at the proper time and, as I say, I will tell the defendant now to have their correspondence with Funke available should it be needed for rebuttal of any issue that they may put on. And I think that is as fair as I can be to both of you.

Mr. Fettis: I think that is right. I might say this: I would be surprised if there is anything in it that would really contribute to our case in chief but I don't know what they might disclose.

Of course, if we discover in looking at this that they wrote and told Mr. Funke that this idea had already been submitted to them, this would be very important to our case in chief but I am quite sure that would not appear in the correspondence. I don't think Sunbeam would be in that position probably.

The Court: Well, it could appear, it could be explainable. Nobody has developed yet a method to take away from the presentation of a case what I used to like to call the "innuendoes of innocence." And I suspect that I am more aware than any of you in my effort to see that the litigants obtain justice as distinct from counsel obtaining justice which is the responsibility that keeps the Court weighing at all times the ability of counsel with what they have to work with to present their position. And this is why the courts are sometimes accused of trying a case of one side or the other. As the fellow said, "Judge, you don't get the fee. Let me try my own case."

(Colloquy here is had off the record.)

The Court: Anyhow, with that addition, and remind me that I have made it an addition to the pretrial order if it becomes necessary.

Mr. Miller: We can prepare an order and cover it, Judge, the ruling on the privileged documents, point out that the discovery is finished except for the problem on the Funke thing. Your order is that we will have the correspondence available for you to rule on it if it is offered in rebuttal.

The Court: That is right, if it becomes necessary in proper rebuttal.

Mr. Fettis: May I ask to interpret this: If we feel in the course of the trial—I don't know whether we will or not —but if we feel that this might be pertinent for rebuttal would we be privileged to examine it at that time?

The Court: If you don't delay it, but I mean I am going to pass on it as to whether or not it is rebuttal.

Mr. Miller: Sure.

The Court: Yes, you will get to see it if it becomes necessary in proper rebuttal, if you have a specific request

for a specific item. "All correspondence relating to it." In other words, you have got to pin down, for instance, what you want.

Mr. Fettis: For instance, here is what will happen: we will ask them, as we have already, whether or not they entered into any agreement to pay anything to Funke for his submission which he made to them and which I understand they will say, "No."

The Court: All right.

Mr. Miller: That is what I told them because that is what I understand.

Mr. Fettis: Then if we ask them on what grounds they turned him down, I don't know what the answer to that will be. I assume it will be because they felt he had nothing that was novel or patentable and so forth.

The Court: Well, when they are on the witness stand you can certainly be able to inquire if they did turn them down, "Did you write a letter turning them down."

Mr. Fettis: That is what I am getting to.

The Court: Yes, I know what you are getting to. If they say, "Yes, we did," you can say, "Let me see the letter."

Mr. Fettis: That is what I want.

The Court: That isn't any problem. That is why I am having them have them here.

Mr. Fettis: That is fine.

The Court: And you better put "agreements or correspondence".

Mr. Miller: "Correspondence."

The Court: "Or agreements with Funke."

Mr. Miller: That is what I understood you meant.

The Court: Yes. And this would be on cross-examination.

Mr. Fettis: Yes, this is fine.

The Court: We are not trying to keep you from it.

Mr. Fettis: I know that.